The Central Law Journal.

ST. LOUIS, APRIL 25, 1884.

CURRENT TOPICS.

The question as to the binding force of a waiver of jury trial by the accused in a criminal case arose recently in State v. Carman, decided by the Supreme Court of Iowa. The statute required that "issues of facts (in criminal trials) must be tried by a jury on which the indictment is found." This is only declaratory of the common law and constitutional law. The court held that a waiver of jury trial was void, the indictment being for assault with intent to kill. Says the court;

"The question presented is not as to the waiver of a mere statutory privilege, but an imperative provision, based, as we view it, upon the soundest conception of public policy. Life and liberty are too sacred to be placed at the disposal of any one man, and always will be so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safeguards. There is no resemblance between such a case and that of a person pleading guilty. In the latter case there is no trial, but mere judgment upon the plea. If the language of the statute were less imperative than it is, the adjudications would support us in reaching the same conclusion. Hill v. People, 16 Mich. 351; State v. Maine, 27 Conn. 281; Bond v. State. 17 Ark. 290; Wilson v. State, 16 Ark. 601; League v. State, 36 Md. 259; Williams v. State, 12 Ohio St. 622; People v. Smith, 9 Mich. 193; U. S. v. Taylor, 11 Fed. Rep. 470."

SEEVERS, J., in rendering his dissenting opinion, says:

"The constitution provides that the accused 'shall have the right * * * to be confronted with the witnesses against him.' This language is just as mandatory as that contained in the statute in question, and yet it was held, in State v. Polson, 29 Iowa, 133, that a personal privilege only was conferred on the accused which he could waive, and that such waiver did not affect the jurisdiction of the court.

"The constitution provides that 'the right of trial by jury shall remain inviolate.' Every one admits this means a jury composed of twelve men. But it was held in State v. Kaufman, 51 Iowa, 578; s. c. 2 N. W. Rep. 275, that such a jury might be waived by the accused, and the trial be held by a jury composed of eleven men. If the jury may be composed of eleven men why should not six men be a lawful jury; and if six may be, why should not one man compose a lawful jury, if the accused elected to be so tried. One man constitutes the court by whom the defendant asked the facts should be determined; such man, therefore, constituted the jury the defendant elected to be tried by. There is no magic in the name court. The same man constituting the court under different circumstances might constitute the jury. That a personal right or statutory privilege conferred on a person accused of crime may be waived by the person so accused, has been held in State v. Hughes, 4 Iowa, 554; State v. Groome, 10 Iowa, 308; State v. Ostrander, 18 Iowa, 435; State v. Reid, 20 Iowa, 413; and State v. Filter, 25 Iowa, 67. Besides this, I think it can be safely asserted, as the settled doctrine in this State that no one can be permitted to take advantage of an error committed by a court which was done at his solicitation and request, and yet that is the result of the foregoing opinion.

"The statute under consideration, in my judgment, is directory only, and in this I am confirmed by the constitutional provisions on the same subject. The provision that 'the right of trial by jury shall remain inviolate,' contained in section 9 of article 1, simply means that the accused can not be legally deprived of such right. It confers on the accused a right, but it deprives him of none. The next section (10) provide that the accused 'shall have a right to a speedy and public trial by an impartial jury.' Several rights are here conferred, but there are no restrictions. Suppos the accused waives a speedy trial or a public tria l could he take advantage of such waiver, or would th jurisdiction of the court be affected? I conclude not. Neither the constitution nor statute provides that the accused can not elect to be tried by a court which h full and complete jurisdiction, and I am unable to see why he can not be legally so tried, or why he can not demand the right to be so tried, as a personal privilege and right.

"It is at least intimated in the foregoing opinion that the ruling would be the same if there was no statute on the subject. Authorities are cited in support of this proposition. I have not examined them with much care, because I deem it unnecessary. I concede that the great weight of authority is opposed to my view. But such authorities are logically inconsistent with and opposed to State v. Polson and State v. Kaufman, *supra*. Such authorities, if followed to their logical results, would overrule the two cases just referred to. But I do not understand the foregoing opinion to do this, in terms, but it does so indirectly, because no well-grounded reason can be given that there is any distinction between them. Certainly, the foregoing opinion fails to do so. It seems to be supposed that 'life and liberty' is too sacred to be placed at the disposal of any one man, and that an innocent man might be influenced to waive a trial by jury—the great safeguard provided by law. This same thought has been otherwise expressed in some of the authorities cited; that 'the state—the public—have an interest in the preservation of the lives and liberties of the citizens, and will not allow them to be taken away without due process of law.' To my mind this reasoning is not satisfactory. It is certainly true the accused can plead guilty. The State does not interfere to protect the citizen in such case. If he may plead guilty, why may he not elect to be tried by the court, instead of a jury? The innocent and fallible man would be just as likely to plead guilty as elect to be tried by the court. Believing as I do that the foregoing opinion logically and by indirection overrules State v. Polson and State v. Kaufman, I am unable to assent thereto."

We confess our surprise (and, we believe, every one will feel as we do), at a recent decision of the United States Supreme Court in United States v. Ryder, to the effect that bondsmen on a criminal recognizance are not entitled to be subrogated to the rights of the goverment, upon being obliged to pay the penalty of the bond, but substantially that a bondsman has no remedy for his loss by the principal's default even against him. There are expressions in Jones v. Orchard, 16 C. B. 614, and Cripps v. Hartnoll, 4 B. & S. 414, which seem to uphold this decision. Chief Baron Pollock said in the latter case:

"Here the bail was given in a criminal proceeding; and, where the bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him. There is no debt, and with respect to the person who bails there is hardly a duty; and it may very well be that the promise to indemnify the bail in a criminal matter should be considered purely as an indemnity, which it has been decided to be."

"This decision," says Judge Bradley, "has not, so far as we are aware, been shaken by any subsequent case in England or in this country; and we think it is based on very satisfactory grounds. This may be more apparent when we consider the peculiar character and objects of bail in criminal cases as compared with the object and purpose of bail in civil cases. The object of bail in civil cases is, either directly or indirectly, to secure the payment of a debt or other other civil duty; while the object of bail in criminal cases is to secure the appearance of the principal before the court for the purposes of public justice. Payment by the bail in a civil case discharges the obligation of the principal to his creditor, and is only required to the extent of that obligation, whatever may be the penalty of the bond of recognizance, while payment by the bail of their recognizance in criminal cases, though it discharges the bail, does not discharge the obligation of the principal to appear in court; that obligation still remains, and the principal may at any time be retaken and brought into court. To enable the bail, however, to escape the payment of their recognizance by performing that which the recognizance bound them to do, the government will lend them its aid in every proper way, by process and without process, to seize the person of the principal and compel his appearance. This is the kind of subrogation which exists in criminal cases, namely, subrogation to the means of enforcing the performance of the thing which the recognizance of bail is intended to secure the performance of, and not subrogation to the peculiar remedies which the government may have for collecting the penalty; for this would be to aid the bail to get rid of their obligation, and to relieve them from the motives to exert themselves in securing the appearance of the principal. Subrogation to the latter remedies would clearly be against public policy by subverting, as far as it might prove effectual, the very object and purpose of the recognizance. It would be as though the government should say to the bail, 'We will aid you to get the amount of your recognizance from the principal, so that you may be relieved from your obligation to surrender him to justice.' If payment of the recognizance operated as a satisfaction or composition of the crime, then the subrogation contended for might be free from this objection: for then the government would be satisfied in regard to the principal matter intended to be secured."

We observe that there is still some excitement over Dodge v. Kinzy and Mr. Thornton's article on "Tenancies by the Entirety" which was suggested by the case. We publish in another column a letter from Mr. Thornton in reply to the criticism of "H. J. D." We have not looked into the merits of the dispute, but we have no hesitation, as between "H. J. D." and Mr. Thornton in expressing the opinion that the latter having made a special study of the question is more competent to speak for the courts than "H. J. D." He has examined the cases themselves, whereas "H. J. D." in all probability relied upon some delusive general reference. Mr. Thornton's articles always appear to be the results of deep and careful investigation and thought, and the man who attempts to criticise them must needs be careful as to the merits of his criticism. We desire of course, criticism whenever it is justifiable, and our columns are always open for that purpose, but reckless criticism we deprecate by all means. As for Mr. Shack's communication, which we print in another column we appreciate his watchfulness in discovering the feature to which he calls our attention as having been overlooked and will say that Mr. Thornton purposely overlooked it and he will on page 326 of this number find an article upon the effect of the Married Woman's separate Property Acts upon "Tenancies by the Entirety." We trust our readers have not been too impatient for its appearance.

The English *Law Journal* must be a strong optimist, for it sees enjoyment for the lawyers in the Cincinnati riot. It says:

"Practitioners before Judge Lynch are sure in the long run to have the worst of it in conflict with regular justice. The rioters of Cincinnati, by sacrificing a number of innocent lives and destroying much propery of innocent persons, have induced a terrorism the effect of which will probably be that the next person tried for murder will be hanged, guilty or innocent. Like Jack Cade's, their rage centred on the lawyers, and they proceeded to execute their vengeance by burning the Court House. The result has been a vast destruction of wills deposited there, of registers of births, marriages and deaths, of memorials, of conveyances, mortgages and releases, of records of judgments, and of receipts for taxes. This act of wild justice will give occupation for many a day to the ordinary courts, and will help to fill the pockets of generations of those lawyers whom it was unreasonably attempted to injure."

MANDATORY INJUNCTIONS.

I.

Restraining a person from doing a particular thing does not always prevent the commission of an injury, for there are many instances in which it is necessary to compel the performance of a certain act in order to prevent the threatened injury. In illustration of this statement, the opening of a sluiceway may be cited. After the sluiceway is opened an injunction to prevent its being opened is useless and absurd; but one to close it will render a great benefit to the lands which the escaping water is flooding. In such an instance the escaping water works a continuing damage, and is a threatening menace of danger.

In the supposed case, a court of equity has full power to prevent the threatened damage, by compeling the wrong-doer to close the sluiceway. Although the court has no power to issue an order or mandatory injunction commanding the wrong-doer, in direct terms, to close the sluiceway, yet, it accomplishes the purpose by commanding him to cease from allowing the water to flow. The writ is framed in an indirect form, and compels the defendant to restore things to their former condition, thus virtually directing him "to perform an act."[1]

A mandatory injunction is issued with extreme caution, and is confined to cases where courts of law are unable to afford adequate redress, or where the injury can not be compensated in damages.[2] Before granting it, the court will take into consideration the relative convenience and inconvenience which would result to the parties from granting or withholding the relief prayed.[3]

Thus where A was the owner of two adjoing lots in a town, and he sold one of them to B, stipulating in the deed that B should have a right of way across the unsold lot to, and the use of a privy situated upon it; and afterwards A, claiming the privy was a nuisance, demolished it, it was held that a court of equity had power to order A to restore it, or allow this to be done by B at A's expense.[4] In another case, the owner of two adjoining lots built a double house upon them, the partition wall standing five feet over on lot A. He then conveyed, at the same time, both lots to different persons, and they, at different times, conveyed both lots to different grantees. The owner of lot A, desiring to remodel his house, and convert it to another use, took the roof from the house situated on lot B to the extent it covered the five foot strip of ground between the wall and the division line between the two lots, cut loose every other rafter supporting the roof, took up the floor of the second story over the strip, and proceeded to make various openings in the partition wall, leaving the inside of the house on lot B entirely exposed. Upon application being made to a court of equity, it was held that the owner of lot B had a right to have his house supported by lot A to the extent of the five feet, and that it had the power to compel the restoration of the part destroyed. "To do otherwise would be to give the defendant a right by reason of his wrong."[5] In the case last cited, had the court not entered such an order, other injuries would have followed, and so much of the house as remained in good condition, would have been totally destroyed. It was a continuing, and also a threatened injury, and the restoration was compelled, not so much because of the injury already done, but to prevent any further injury in the future. A New York case furnishes another illustration where a mandatory injunction was issued. The defendant leased the right to divert and use a stream of water for a term of thirty-four

[1] Joyce on Injunctions, 1310; High on Injunctions, sec. 2; Kerr on Injunctions, p. 230; 2 Story Eq. Jur. 861; Jermy Eq. Jur. Ch. 2, sec. 1; Wooddes Lect. 56, p. 397; Gill Forum Roman, Ch. 11, p. 194, 195; Huguenin v. Baseley, 15 Ves. 179; Stribley v. Hawkie, 3 Atk. 275; Com. Dig. Chancery D. 11, 13; Newland's Prac. 198; Beam. Ord. Ch. 15, 16. A mandatory writ was issued as early as the time of Elizabeth. Wist's Symbol, pt. 2, p. 189; Kershaw v. Thompson, 4 Johns. Ch. 609. See Wangelin v. Goe, 50 Ill. p. 463. Mr. Eden terms it a "judicial writ," and says it "issues subsequent to a decree. It is a direction to yield up, to quit, or continue the possession of lands, and is properly described as being in the nature of an execution." Eden on Injunction, (ed. 1839) 12, 425. See Stanford v. Lyon, 37 N. J. Eq. —.

[2] Isenberg v. East India, H. E. Co. 33 L. J. Ch. 392.

[3] High on Injunction, sec. 2; Flippin v. Knaffle, 2 Tenn. Ch. 238; Isenberg v. East Indian H. E. Co., *supra*.

[4] Morrison v. Marquardt, 24 Iowa 35; s. c. 7 Am. L. Reg. 336.

[5] Henry v. Koch, (Ky.) 22 Am. L. Reg. 394.

years, and during that time erected large and valuable mills which were run by the leased water. At the end of the lease the defendant continued to use the water so leased for four years, having made no arrangement with the plaintiff for its continuation. The plaintiff brought an action to enjoin the use of the water, and to compel its restoration to the old channel. The appellate court held that he was entitled to relief; and that he had not lost the right to the relief prayed because the defendant's valuable mills would be rendered useless by the diversion, nor because he had delayed action for four years after the lease had expired, nor because he had never made any use of the water or claimed that he desired to use it. An order was entered that the stream be restored within twelve months. It was held that the grounds for equitable interference in such a case was two-fold: first, the inadequacy of any legal remedy to secure the party in the enjoyment of his right to have the water flow in its natural channel; second, to prevent a multiplicity of suits for damages accruing from the daily and continuous wrongful diversion of the stream.[6]

Under the proper showing the writ may be issued to close a ditch unlawfully opened, by which lands of the complainant are flooded;[7] or to restore the flowage of water wrongfully cut off, necessary to run a factory, especially so where the amount of loss of profit will be difficult or impossible to estimate;[8] or to compel the defendant to permit the stream to flow regularly where he is causing it to flow periodically.[9] And where the defendant turned a stream of water into the plaintiff's mine, an injunction was issued to restain permitting the place where the stream found an entrance to remain open.[10] So, where water was diverted from a mine, which was necessary in mining operations, its restoration was compelled by means of this writ.[11] In New Jersey a railway company had appropriated a right of way over the defendant's lands, and had payed him the assessed damages; it was held that an injunction could issue to restrain him from keeping the water in his mill dam at such an unusual height as to flood the right of way and prevent its use. In this case, however, it was said that the writ was not a mandatory injunction; but it is difficult to distinguish it from the ordinary mandatory writ.[12]

If a duty devolves upon a person or corporation, either by contract or statute, to keep up a work of public use and interest, this writ will issue to compel the performance of such duty. In Pennsylvania a mandatory injunction was issued at the instance of the attorney-general to restrain a company from neglecting to repair its canal, dams, locks and other devices for navigation.[13] A similar order was made in England, although it was said that the court would not grant the injunction to restore the banks of the canal and to make other repairs, but simply to restrain the guilty party from impeding or hindering the complainant in the use of the water granted by a lease, by continuing to keep the canal and works out of repair, and by diverting the water and hindering the complainant in its use.[14]

In case of a nuisance, a court of equity has the power, in a proper action, to order its abatement; and in order to attain the desired result, it may issue a mandatory injunction. Where an open sewer had become a public nuisance, the health officer of the district was restrained by a mandatory injunction from allowing it to remain open.[15] In a celebrated case the Supreme Court of the United States made use of this writ although not refering to it as such. In the case referred to, the State of Pennsylvania filed a petition in the court for an injunction to prevent the Wheeling Bridge Company from obstructing the navigation of

6 Corning v. The Troy Iron and Nail Factory, 40 N. Y. 191; s. c. 39 Barb. 311; 34 Barb. 485.

7 Foot v. Bronson, 4 Lans. (N. Y.) 47; Lamborn v. Covington Co., 2 Md. Ch. 409.

8 Isenberg v. East India H. E. 33 L. J. Eq. 392.

9 Murdock's Case, 2 Bland (Md.) Ch. 471; s. c. 20 Am. Dec. 381. This case is a good illustration of the form of the order usually issued to accomplish the desired object. See Webb v. Portland Manufacturing Co., 3 Sumn. 189; Robinson v. Lord Byron, 1 Bro. C. C. 588.

10 Mexborough v. Bower, 7 Beavan, 127.

11 Cole Silver Mining Co. v. The Virginia and Gold Hill Water Co., 1 Sawyer, 470.

12 Longwood R. R. Co. v. Baker, 12 C. E. Green, 166. See Tatem v. Gilpin, 1 Del. Ch. 14, 23. So the removal of flash boards on a dam was compelled. Knapp v. Douglass Axe Co., 13 Allen, 1.

13 Buck Mountain Coal Co. v. Lehigh, Coal & Navigation Co. 50 Pa. St. 91.

14 Lane v. Newdigate, 10. Ves. 192.

15 Manchester R. R. Co. v. Workshop Board of Health. 23 Beavan, 209; Pierce v. New Orleans, 18 La. Ann. 242; See Stanford v. Lyon. 37 N. J. Eq—; Attorney-General v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. App. 146.

the Ohio river by its bridge, which was then nearly completed, amounting to as much an obstruction then as if it had been finished the court issued an order compelling the company to change the bridge according to certain specifications, and that it do so by a certain date.[16] The court's powers in the premises seem to have been unquestioned; and there is no doubt that if a public highway is unlawfully closed up, an injunction will issue to compel its opening.[17]

But the power of the court does not stop in cases of a public nuisance; it extends to a private nuisance. Thus a defendant was restrained from permitting an obstruction to remain on the plaintiff's roof;[18] another from permitting tiles remaining on the tops of chimneys where he had wrongfully placed them for the purpose of smoking out the plaintiff.[19]

In case of a threatening or menacing danger brought about by the defendant, if the danger is imminent, the writ will be issued, although no harm has yet resulted to the plaintiff. Such was the case where the defendant had placed in close proximity to the plaintiff's building a large amount of very combustible jute.[20] And there is no doubt that in case of a large amount of explosive material being placed so near the building of another, without his consent, that if it were to explode it would do damage to the building, a court of equity could compel its removal.

The writ may be used to compel the removal of a building or structure that has been wrongfully erected upon the premises of another,[21] or in violation of a contract or covenant running with the land, where the building or structure is put up before a restraining order can be obtained.[22] The same is true where a structure is erected in violation of a statute. A statute of Connecticut provided that an injunction might be granted to prevent the malicious erection upon one's own land of any structure intended to annoy or injure any proprietor of adjacent land, in respect to his use of the same; and a structure having been stealthily erected before an application for an injunction could be made, the court granted an injunction against its continuance.[23] In another instance the writ was issued to compel the removal of water-pipes laid in the soil.[24]

Where the doctrine of ancient lights prevails, the writ may be used to compel the opening of a window wrongfully closed;[25] and in one instance this was done before final hearing.[26]

In case of a disagreement of the members of a partnership, the rights of each partner may be protected by means of this writ, if its use is necessary. Thus where the plaintiff was denied access to the books of the firm, of which he was a member, this writ was issued to the members denying him the right of access, commanding them to cease preventing him from access to such books;[27] and in another instance to prevent them from excluding him from his right as a partner.[28] So the writ is used to protect the rights of members of a corporation, or to compel their restoration to the rights of corporators.[29] Likewise the writ can issue to restore members of a church to their participation in the church affairs, when they have been excluded in violation of the society's rules and regulations. Thus in one instance a minister was reinstated over his congregation.[30] And where, in an action by a church corporation, it was al-

16 Pennsylvania v. The Wheeling Bridge Co. 13 How. 518.

17 Stevens v. Newark R. R. Co., 20 N. J. Eq. 126; McDonogh v. Calloway, 7 Robinson 442; Newmarch v. Brandling, 3 Swanston 99.

18 Martyr v. Lawrence, 2 DeGex, J. & S. 261.

19 Hervey v. Smith, 1 Kay & J. 392; Attorney-General v. Metropolitan Board, 1 Hem. & Mil. 321.

20 Hepburn v. Lardner, 2 Hem. & Mil. 345.

21 Krehl v. Burrell, 7 Ch. Div. 551; Rankin v. Huskisson, 4 Sim. 13; North of England R. W. Co. v. Clarance R. W. Co. 1 Coll. 507; As where the defendant put a wall upon the plaintiff's land by mistake Creeley v. Bay State Brick Co. 103 Mass. 514.

22 Gaskin v. Balls, 13 Ch. Div. 324, where a railroad company, to forestall an injunction, built a bridge over a cottage in one night, the court enjoined the company from using it. Cited by Lord Langdale in Rankin v. East & West India Docks R. R. Co. 12 Beav. 305.

23 Harbison v. White, 46 Conn. 106.

24 Goodson v. Richardson, L. R. 9 Ch. App. 221.

25 Kelk v. Pearson, L. R. 6 Ch. 809.

26 Bladel v. Rengy, L. R. 3 Eq. 465. The right to an injunction to open the windows may be lost by delay. Senior v. Pawson, L. R. 3 Eq, 330.

27 Taylor v. Davis, 3 Beav. 388, note; and to prevent them from keeping the books at any other place of business than the place where the partnership business is transacted. Greatrex v. Greatrex, 1 DeGex & Sim. 692.

28 Marble Company v. Ripley, 10 Wall 339; Eachus v. Moss. 14 W. R. 327.

29 See Tipton Fire Ins. Co. v. Barnheisel, 2 Ind. L. Mag. 89.

30 Whitcar v. Michenor, 37 N. J. Eq.—

leged that the defendants had taken possession of its church building and part of its records, and were threatening to seize the remainder of the records and all its temporalities, it was held that the restraining order would issue to enjoin the defendants from further interfering with the property or temporalities of the corporation, and that the plaintiff, by its officers and members, be restored to the peaceful possession of its rights without any further order of the court.[31]

Crawfordsville, Ind. W. W. THORNTON.

[31] Lutheran Ev. Church v. Gristgan, 34 Wis. 328; See Baptist Congregation v. Scannel, 3 Grant (Pa.) 48.

TENANCIES BY THE ENTIRETY UNDER THE MARRIED WOMEN'S ACTS.

Now that the excitement attending the decision of Dodge v. Kinzey, by the Supreme Court of Indiana, has pretty well subsided, we can address ourselves to a feature of that decision which was purposely overlooked by Mr. Thornton in his article on Tenancies by the Entirety,[1] especially as the subject has been one of judicial comment of late in the Federal courts and in England. Married women's separate property legislation, and laws removing their disabilities have now become universal. The fiction of unity which so long swayed the minds of judges has been swept away by these laws; so that now the identity of a wife is a legal reality, and is not merged in that of her spouse. As pointed out by Mr. Thornton, the doctrine of unity was carried so far that if a devise of land was made to a husband and wife and a third person, as tenants in common, the husband and wife would take but an undivided half as tenants by the entirety, while the remaining half would go to the third grantee.[2]

[1] 18 Cent. L. J. 183.

[2] Litt sec. 291, Doe v. Hardenbergh, 5 Halst. 42; s. c. 18 Am. Dec. 371; Doe v. Wilson, 4 B. & A. 303; Barber v. Harris, 15 Wend. 615; Back v. Andrew, 2 Vern. 120; Bricker v. Whatley, 1 Vern. 233. *In re* Wylde, 2 D. M. & G. 724; Gordon v. Whieldon, 18 L. Rep. (N. S.) Chan. 5; s. c. 11 Beavan, 170; Atcheson v. Atcheson, 18 L. J. Rep. (N. S.) Ch. 230; s. c. 11 Beavan, 485. See Johnson v. Hart, 6 W. & S. 919; s. c. 40 Am. Dec. 565; Warrington v. Warrington, 12 Hare, 56, seems opposed to all authority.

This very case recently arose in England, and the construction of the Married Women's Property Act, 1882, was the question at issue.[3] The act provided that, "a married woman shall, in accordance with the provisions of this act, be capable of acquiring, holding, and disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were a *femme sole*, without the intervention of any trustee." "It appears to me," said Chitty, J., in delivering the opinion of the High Court (Chancery Division), "that the act makes such alterations in the relation of husband and wife, that it severs that unity of person, and divides that compound person which the law formerly recognised, to such an extent as to make it wrong for the court to apply the old principle which was founded on unity of person. On these grounds, shortly, I am of opinion that this property is divisible in thirds, subject to the joint tenancy being severed. I therefore decide that a joint tenancy exists, and that Mander takes one third, Mr. Harris one-third, and Mrs. Harris the remaining one-third for her separate use, and I make an order accordingly."

Certainly, the court could have found no stronger ground upon which to base its decision than the act itself; and when we come to consider the recent decision of Judge Deady of the United States Circuit Court of Oregon,[4] at which the opposite conclusion was arrived at, the dissimularity of the acts may account for the different constructions. The Oregon act read: "The property and pecuniary rights of every married woman, at the time of marriage, or afterward acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of the husband; and laws shall be passed for the registration of the wife's separate property." There was also an act providing that a conveyance to two or more persons should create a tenancy in common, but the learned judge denied any application of this act to them, on the ground that husband and wife are but *one* person, and, therefore, without the scope of the act.[5]

[3] *In re* Beach Mander v. Harris, 47 J. P. 23.

[4] In Myers v. Reed, Dec. 14, 1883.

[5] Dios v. Glover, 1 Hoff. Ch. 71; Torrey v. Torrey, 14 N. Y. 430; Wright v. Saddler, 20 Id. 320; Doe v.

The subject underwent a thorough examination within the past year in the New York Court of Appeals,[6] where against the protest of a minority, the old decisions to the contrary were overruled, and the doctrine firmly established that the Married Women's Separate Property Acts have not abrogated in the slightest the common law rules as to estates by the entirety. The act of New York provided that all property which comes to a married woman "by descent, devise, bequest, gift or grant" * * * * "shall notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband or liable for his debts." "The common law incidents of marriage," say the court, "are swept away only by express enactments. * * * * We fail to find any reason for holding that the common law rule, as to the effect of a conveyance to husband and wife has been abrogated." "To my mind," said Johnson, J., in another New York case, "it is a clear proposition that our recent statutes for the better protection of the separate property of married women, have no relation to or effect upon real estate conveyed to husband and wife jointly."[7]

"These statutes," said Gilbert, J., speaking for the same court on another occasion "operate only upon property which is exclusively the wife's and were not intended to destroy the legal unity of husband and wife or to change the rule of the common law governing the effect of conveyances to them jointly."[8] The question afterward arose in Meeker v. Wright,[9] where Danforth, J., in the course of his opinion which was concurred in by the other judges, but upon other grounds, declared that the case was "within the letter of the act and within its spirit; it is not excepted from its provisions. The statute and the common law can not stand together and the latter must give way. It never stood upon truth or reason, but on a fiction. It ignored the civil existence of the wife and merged it with all her rights in that of her husband, and can be sustained, if at all, by an idle and unprofitable refinement. Under the statutes, the interests of the husband and wife are no longer a identical, but separate and independent." And Judge Mullin in delivering the opinion of the Supreme Court said; "The husband and wife are for all legal purposes no longer one person."[10] As late as 1882, the Supreme Court of that State maintained that as to a grant to a wife and husband, she is to be deemed as if unmarried.[11] But of course this late decision by the court of Appeals settles the law of that State.[12]

Bishop in his treatise upon the Laws of Married Women well states the reason of the doctrine to be "that the statutes which preserves to married women their separate rights of property, do not have or profess to have any effect upon the capacity of the wife to take property or the manner of taking it, but when she does take it they simply preserve the right in her, to her separate property forbidding it to pass in part or in full to her husband under the rules of the unwritten law."[13]

This doctrine has been repeatedly recognized in Pennsylvania. Judge Strong forcibly asserts that the contrary view "mistakes alike the letter and the spirit of the statutes imputing a purpose never intended. The design of the legislature was single. It was not to destroy the oneness of husband and wife but to protect the wife's property, by removing it from under the dominion of her husband. To effect this object she was enabled to own use and enjoy her property, *

Hardenbergh, 5 Halst. (N. J.) 42; S. C. 18 Am. Dec. 371; Shaw v. Hearsey, 5 Mass. 521; *In re* Lowell, 22 Pick. 215, 221; Jackson v. Stevens, 16 Johns. 115; Jackson v. Carey, Id. 305; Thornton v. Thornton, 3 Rand. 179; Hemingway v, Scaler, 42 Miss. 1; 2 Am Rep. 586; McCurd v. Conning, 64 Pa. St. 39. See note 12 to article of W. W. Thornton, Esq. 18 Cent. L. J. 184.

[6] Bertles v. Noonan, 92 N. Y. 162; 44 Am. Rep. 361.

[7] Farmers and Mechanics' Nat. Bank of Rochester v. Gregory, 49 Barb. 155. See also opinion of Sutherland, J., in Goelet v. Geri, 31 Barb. 314. Also, of Murray, J., in Miller v. Miller, 9 Abb. Pr. (N. S.) 444, and Freeman v. Freeman, 3 N. Y. Sup. Ct. (T. & C.) 574; Beach v. Hollister, 3 Hun. 519.

[8] Beach v. Hollister, 3 Hun. 519. See Wood v. Crum, 54 How. Pr. 95; Forsyth v. McCall, decided in the fourth department of N. Y. in June, 1880.

[9] 76 N. Y. 262. But see 27 Alb. L. J. 199.

[10] Matteson v. The N. Y. Central R. R. Co. 62 Barb. 373.

[11] Feely v. Buckley, 28 Hun. 451.

[12] Bertles v. Nunan, *supra*.

[13] 1 Bishop on the Laws of Married Women, 438, sec. 613 etc, 2 Id. 284 sec. 284.

* as fully after marriage as before.* * * All they had in view was the enjoyment of that which is hers, not the force and effect of the instrument by which an estate may be granted to her. The act does not operate upon rights occuring to her after they have occured. It takes such rights of property as it finds them, and regulates the enjoyment of the estate after it has vested in the wife."[14]

Under the Arkansas Constitution which provided that the real and personal estate of every female acquired before and after marriage whether by gift, grant, etc. shall remain the separate estate and property of such female and may be devised by her in the same manner as if she were sole, the court held that the article applied only to the separate estate of the wife and is intended "to preserve it from liability for the debts of her husband, and authorizes her to devise and bequeath it." The court doubted the policy of the married womens acts claiming that they tended to weaken the marriage tie "and thus become a fruitful source of bickering and discontent which often end in separation and divorce" and declaring that they were not "disposed to enlarge the rule so as to include property conveyed to husband and wife jointly." We prefer" said the court in its conclusion "to stand by the rule sanctioned by Divine "wisdom as well as the decisions of the ablest jurists of England and America, a rule which has been acquiesced in for centuries in Great Britain and approved and followed in nearly all the States."[15]

On the other hand it is held in Iowa and other States that the married woman's acts have revolutionized the law of tenure itself; that in the consideration of grants, the marriage relation must be overlooked and the husband and wife when named as grantees or devises must be treated as strangers to each other. The views of the Supreme Court of Iowa are expressed in these terms. "Her ability now, as compared with the rule of the common law, to take a separate estate, has enabled her to stand seized in her own rights jointly with the husband, and to hold by moieties just as joint tenants could. We say these considerations seem conclusively to show that the rule of the common law as to estates by entirety cannot obtain here. The doctrine always stood upon what was a little more than the *merest fiction*, and as this, by our legislation, has measurably given way to theories and doctrine more in accord with the time and actual relations of husband and wife, the rule itself must be abandoned."[16]

This view of the question has obtained in Illinois, New Hampshire, and Alabama.[17] By the married woman's legislation the one legal person of the common law has resolved itself into two distinct persons so far at least as the capacity of taking separate estates is concerned. Both of the grantees being capable of taking separately it is impossible that they should take by entireties as if they constituted a single person. Of necessity they take by moieties. Being thus invested with the capacity of taking by moieties, the reason on which the rule of the common law was founded has ceased to exist and a devise to husband and wife must stand upon the same footing and create the same estate as if it had been made before coverture to parties who afterwards intermarried. Such the view of the question taken by the Supreme Court of Alabama.[18]

The common law paid no such attention to any end as it did to the securement of domestic peace, and the preservation of that sanctity of the marriage relation which the interests of the public demand and the code of natural law must enforce. The admiration of woman which all men possess has weakened the unselfish regard which should be paid to the dictates of nature, and has step by step caused men to listen to the appeals of unrepresentative women, that the gentle sex be placed in the same level as men. That these Married Women's acts have gradually increased domestic infelicity is a fact which not even a prejudiced advocate of woman's rights can deny, and it is the duty of the court standing from afar, viewing impartially the results of this legislative relaxation, to administer to the changes

[14] Diver v. Diver, 56 Penn. St. 106; Bates v. Seeley, 46 Penn. St. 248; French v. Mehan, 56 Penn. St. 289; Fisher v. Perrin, 25 Mich. 350; Duff v. Beauchany, 50 Miss. 531; McCurdy v. Canning, 64 Pa. St. 39; Matburg v. Cole, 49 Md. 402; 33 Am. Rep. 266.

[15] Robinson v. Eagle, 29 Ark. 202.

[16] Hoffman v. Stigers, 28 Iowa, 307.

[17] Cooper v. Cooper, 76 Ill. 57; Clark v. Clark, 56 N. H. 105; Walthall v. Goree, 36 Ala. 728.

[18] Walthall v. Goree, 36 Ala. 728.

brought about by these false appeals, the rules of strict construction and concede no more than the strict letter of the acts demands. Let the courts, as a majority of them have already done, stand between legislative recklessness and justice, and the folly of this revolutionary legislation, seemingly in the interests of married woman but actually opposed to them, will soon be apparent and legislatures may retrace the steps taken by them.

St. Louis, Mo. * * *

CONVERSION—CERTIFICATES OF STOCK—EVIDENCE OF—DEMAND AND REFUSAL—MEASURE OF DAMAGES.

DAGGETT v. DAVIS.

Supreme Court of Michigan, March 6, 1884.

1. Trover will lie for the conversion of a certificate of stock; and *it seems* that plaintiff may count upon the conversion of the shares as well as upon that of the certificate.

2. Withholding possession of a certificate of stock can not amount to a conversion of the stock itself, so long as the certificate is not indorsed; but it may amount to a technical conversion of the certificate.

3. Conversion is not necessarily the complete and absolute deprivation of the property, but may be a partial or temporary deprivation, the owner retaining possession or regaining it, the difference is only a question of damages which, in the latter case, are usually less than the whole value of the property.

4. Demand and refusal do not of themselves constitute a conversion, but are evidence thereof for a jury.

5. The measure of damages for the conversion of a mere certificate of stock, can not be placed at the value of the shares which it represents, if the ownership of the shares themselves is not affected.

Error to Muskegon.

Cook, DeLong & Fellows, for plaintiffs; *Smith, Nims, Hoyt & Erwin*, for defendant and appellant.

COOLEY, C. J., delivered the opinion of the court:

The plaintiff in this case counts upon the conversion by defendant of a certificate of stock in the Muskegon Wood Package & Basket Company, of the nominal value of $2,500, belonging to the plaintiff and standing in his name. The company is a corporation, and the plaintiff, prior to April, 1881, was its secretary and manager, and the defendant was its president. The plaintiff ceased to be secretary of the company about April 20, 1881, and when he surrendered the office left this certificate in the company's safe. From the safe it was taken by defendant, as he claimed, without intention, and because it had in some way got among some of his own papers. When he was called upon for it he at first denied having it, but afterwards, when he had found it, he declined, according to the testimony for the plaintiff, to surrender it, and made some claim that there were unadjusted matters between the plaintiff and the corporation which plaintiff should first adjust. A formal demand for the certificate having then been made, this suit was instituted. There was one trial of the suit before the one in which this judgment was recovered, and it appears that on that trial the certificate was produced—probably under a subpœna *duces tecum*—and was used by the plaintiff in making his proofs, and then left among the court files. On the second trial it could not be found, and secondary evidence had to be adduced to prove the contents.

There was no evidence that defendant had ever made any use of the certificate for his own purposes; he had merely refused to surrender it to the plaintiff when it was demanded. Neither was there evidence that the plaintiff had ever been denied his rights as a shareholder in the corporation, either at a corporate meeting or at any other time. The plaintiff's action was grounded on the two facts that the defendant had retained in his hands the plaintiff's certificate of stock, and had refused to surrender it on demand. This refusal was submitted to the jury as evidence of a conversion, and they found a conversion upon it, and gave the plaintiff a verdict for the par value of the stock, which they appear to have found to be the market value.

The questions arising upon the record are—*First*, whether trover will lie for a certificate of corporate stock; *second*, if it will lie, whether a conversion was sufficiently shown in this case; and *third*, whether the damages are to be measured by the market value of the stock.

1. That trover will lie for shares of stock was held in Morton v. Preston, 18 Mich. 60. The facts in that case were that the widow and heirs of a shareholder in a corporation, thinking to avoid the expense of administration, took his certificate of shares and indorsed their names upon it, and then left it with one of their number to be sold for the benefit of all. This one, instead of selling it, pledged it for his own debt, and the pledgee was recognized by the corporation as the owner of the stock, and disposed of it as owner. An administrator upon the shareholder's estate having subsequently been appointed, he brought suit against he pledgee for the conversion, and was held entitled to recover. This statement of the facts is sufficient to show that in that case there had been a conversion of the stock in the strictest sense of the term, and that the damages suffered were the value of the stock. For cases supporting this, reference may be had to Anderson v. Nicholas, 28 N. Y. 600; Maryland F. Ins. Co. v. Dalrymple, 25 Md. 242; Jarvis v. Rogers, 15 Mass. 389; Ayres v. French, 41 Conn. 142; Boylan v. Huguet, 8 Nev. 352; Kuhn v. McAllister, 1 Utah, 275; affirmed in 96 U. S. 87; Payne v. Elliott, 54

Cal. 339; s. c. 35 Amer. Rep. 80; Connor v. Hillier, 11 Rich. 193.

In Neiler v. Kelley, 69 Penn. St. 403, following Sewell v. Lancaster Bank, 17 Serg. & R. 285, it was held that trover would not lie for the shares of stock, but must be brought, as it has been in this case, for the certificate which represents the stock. But we see no reason why, if the shares are converted by means of a wrongful use of the certificate, the owner in suing may not count upon the conversion of either. The shares are the property converted, but the certificate itself is also property; standing as it does as the representative of the shares, and as its conversion may take the shares from the owner, it seems to be as proper to count upon its conversion as upon the conversion of money or any chattel.

2. In this case there neither was nor could be any conversion of the stock, for, though the defendant had the certificate in his possession, he could not make use of it. It stood in the name of the plaintiff, and could not be transferred without the plaintiff's indorsement, which it did not have, and the defendant could make neither the certificate nor the shares the property either of himself or of any third person by anything he could do with the certificate. Anderson v. Nicholas, 28 N. Y. 600, 604, per DENIO, C. J. If, therefore, it were necessary to show a conversion of the stock in order to make out a conversion of the certificate, this suit would fail. But conversion does not necessarily imply a complete and absolute deprivation of property; there may be a deprivation which is only partial or temporary, and where the property of the plaintiff remains in or is restored to him. Liptrot v. Holmes, 1 Kelly, 381, 391; Fisher v. Kyle, 27 Mich. 454; Hall v. Corcoran, 107 Mass. 251; s. c. 9 Amer. Dec. 30. An illustration is where one hires a horse for one use and puts it to another, subsequently returning it to the owner. Homer v. Thwing, 3 Pick. 492; Rotch v. Hawes, 12 Pick. 136; s. c. 22 Amer. Dec. 414: Crocker v. Gullifer, 44 Me. 491; Horsley v. Branch, 1 Humph. 199. The difference between such a case and one in which the property is wholly made away with, is one affecting the damages only; the damages go to the whole value of the property in the one case, and are commonly less in the other. Wheelock v. Wheelwright, 5 Mass. 103; Long v. Lamkin, 9 Cush. 361; Reynolds v. Shuller, 5 Cow. 323; Cook v. Loomis, 26 Conn. 483; Brady v. Whitney, 24 Mich. 153, 156. There may, therefore, have been a technical conversion in this case, though no use was made of the certificate. Demand for the certificate, and refusal to deliver it, did not of themselves constitute a conversion, but they were evidence of a conversion to go to the jury. Thompson v. Rose, 16 Conn. 71; Dent v. Chiles, 5 Stew. & P. 383; s. c. 26 Amer. Dec. 350; Houston v. Dyche, Meigs, 76; Coffin v. Anderson, 4 Blackf. 395; Sturges v. Keith, 57 Ill. 451; s. c. 11 Amer. Rep. 28; Packard v. Gilman, 6 Cow. 757; s. c. 16 Amer. Dec. 475; Hawkins v. Hoffman, 6 Hill, 586; Davis v. Buffum, 51 Me. 160; Farrar v. Bollins, 37 Vt. 295; Huxley v. Hartzell, 44 Mo. 370; Lander v. Bechtel, 55 Wis. 593; (S. C. 13 N. W. Rep. 483.)

3. But the court erred in holding that if a conversion was made out the plaintiff was entitled to recover the market value of the shares. As the plaintiff has all the while remained, and still is, the owner of the shares, and the defendant will not by the recovery become owner, the error seems very plain. There are some cases in which trover has been brought for instruments which were rather the representatives of property than property itself, in which a recovery has been allowed to the full value of the property; but nearly every case has stood upon its own facts, and is easily distinguishable from the present.

In Parry v. Frame, 2 Bos. & P. 451, which was trover for a lease, the plaintiff recovered the full value of the term; but it appeared that he had made arrangements with the landlord which amounted to an appropriation of the term, and the recovery was therefore plainly just.

Clowes v. Hawley, 12 Johns. 484, was trover for a title bond executed by the defendant himself, and when the plaintiff recovered the value of the land, to which he was entitled under the bond, the defendant remained the owner.

Coombe v. Sansom, 1 Dowl. & R. 201, was trover for title deeds, and the plaintiff had a verdict for the large sum of £2,500. But the recovery of such damages appears to have been allowed only as a means of compelling the wrongful possessor of the deeds to surrender them to the owner, and an order was entered for a reduction of the judgment to a sum which would indemnify the plaintiff for his actual damages, on the deeds being restored.

In Mowry v. Wood, 12 Wis. 413, the owner of a certificate issued by the State, and which entitled the holder to receive from the State a deed of certain lands when specified payments were made, was held entitled to recover, in an action for its conversion, not the value of his interest in the land under the certificate, but such sum as would recompense him for any actual loss he had sustained, and for the trouble and expense of establishing and perpetuating the evidence of his title. In other words, he was held entitled to recover only his actual damages.

The case of Connor v. Hillier, 11 Rich. 193, apparently favors the rule of damages given to the jury in this case. The action was for the conversion of a certificate of shares in bank stock, and the court in a very short opinion, citing Parry v. Frame, and Clowes v. Hawley, *supra*, as authority, decided that the plaintiff was entitled to recover the market value of the shares. The defendant had suffered a default, and thereby, as the court say, had admitted the plaintiff's title and the conversion. Perhaps in that state of the case the recovery of the market value was proper. It certainly was proper if the certificate in the defendant's hands could be used and trans-

ferred by him; and the report does not show whether that was or was not the case.

Another case having some apparent bearing is Nelson v. King, 25 Tex. 655. The action was for the conversion of land script. The defendant was bailee of the scrip, and it was shown that he had put it out of his hands by delivery to another person, who refused to recognize the plaintiff's rights. The court held that the scrip was to be regarded as a chattel, and that the plaintiff was not bound to follow it into the hands of third persons and contest with them the title, but might sue for the value, treating the conversion as total. The case is manifestly quite different from the one before us, and apparently resembles Morton v. Preston, in its main facts.

We think the case should be remanded for a new trial.

(The other justices concurred.)

TELEGRAPH—FAILURE TO DELIVER MESSAGE—MEASURE OF DAMAGES.

TELEGRAPH CO. v. CONNELLY.

Texas Court of Appeals, March 5, 1884.

Where A telegraphed B if the latter desired a position to come by first train, and the company failed to deliver the telegram, *held*, B could only recover to the amount of time lost in going to and returning from the place where the position was to be had, and reasonable expenses of such trip.

Appeal from Harris County.

WILLSON, J., delivered the opinion of the court:

This is a suit brought by the appellee, E. G. Connelly, plaintiff, against the appellant, the Western Union Telegraph Company, defendant, for damages for the failure on the part of defendant to deliver to plaintiff the following telegraphic message:

"The Western Union Telegraph Company,
"Milano, Texas, April 10, 1883,
"To E. G. Connelly, Fifth Ward, Houston:
"If you want a place, come first train. Answer.
"J. A. Harris."

The plaintiff being out of employment, and having had experience as a railroad clerk, had applied to J. A. Harris, station master of the Gulf, Colorado & Santa Fe Railroad, at Milano Texas, for employment, and Harris having a vacant clerkship, of which the salary was $75 per month, to offer him, deliver the above message to the defendant's agent at Milano, Texas, on April 10, 1883, to be transmitted and delivered to plaintiff at Houston, Texas. The message was promptly transmitted to Houston. On the following day, April 11, Harris instructed defendant not to deliver the message to plaintiff, if it had not already been delivered, and defendant accordingly, not having delivered it, made no further effort to deliver it to plaintiff. Plaintiff, hearing of the message about April 15, went to Harris, at Milano, for the position, but failed to get it as Harris had already given it to another person, as plaintiff had not come on the first or second train after the message was sent to Houston.

G. C. Felton, the defendant's agent and manager at Houston, testified that the message, on its arrival at Houston, was sent immediately to defendant's branch office, at the Texas & New Orleans Railroad depot, in the fifth ward, as Connelly's address in the city directory was that depot; that neither he, nor, as far as he knew, any of the employes of defendant, knew Connelly's address; that when the message arrived at the branch office it was found that Connelly was no longer staying at that depot.

George Gerkin testified that an employe of the railroad told a boy carrying a telegraphic message from Harris to Connelly, about April 10, where Connelly lived.

Plaintiff testified that he lived about 125, or 150 yards from the depot, and that defendant had delivered a message to him there before.

Plaintiff's amended petition, on which he recovered judgment, was filed July 20, 1883, and alleged that he had been unable to obtain employment since April 10, 1883, and that he had lost the wages that he would have made if the message had been promptly delivered to him by defendant to-wit: $75 per month for six months, aggregating the sum of $450, and prayed for damages in said sum and costs of suit.

The defendant answered, specially excepting and demurring to plaintiff's petition and amended petition, that the damages sought to be recovered were too remote, contingent and uncertain, and by general denial, and specially pleading that defendant was incompetent to fill the position offered him by Harris, and could not have held it if he had obtained it, and that the defendant had not delivered the message after April 11, 1883, by reason of the instruction received on said day from Harris, as above stated.

On July 26, 1883, the case was tried by the court without a jury, and defendant's exceptions were overruled, and plaintiff recovered judgment against defendant for $75, wages for one month, and costs of suit. Defendant gave notice of appeal in open court, and the appeal was duly perfected.

Entertaining the view which we do of this case, we do not consider it essential that we should consider and determine but a single proposition, which is presented by the fourth and fifth assignments of error, which are as follows:

"4. The judgment is contrary to the law and the evidence, in this: that the damages were too remote, contingent and uncertain for plaintiff to recover."

"5. The court erred in overruling defendant's demurrers to plaintiff's petition and amended petition, wherein defendant demurred on the ground

that the damages sought to be recovered by plaintiff were too remote, contingent and uncertain."

This suit is to recover damages resulting from an alleged breach of contract, unaccompanied by fraud, willful wrong, or gross negligence. In such a case, the general rule as to the proper measure of damage is, that the remuneration to the plaintiff is restricted to the amount of injury resulting naturally and proximately as immediate consequences of the breach complained of. Waco Water Co. v. Johnson & Co., W. & W.'s Con. Rep., §§ 193-195; Stresau et al. v. Fidelli, et al., Id. § 848; Hoeker v. Boedeker, Id. § 1034; San Antonio Gas Co. v. Harber & Co., Id. § 1125; Austin City Water Co. v. Capital Ice Co., Id. § 1134; Western Union Telegraph Co. v. Bertram & Moeller, Id. § 1152.

Damages, such as do not directly and naturally result from the breach of a contract and are not reasonably supposed to have existed in the contemplation of the parties to the contract are remote and consequential, and cannot be recovered. G., H. & S. A. Ry. v. Marsden, W. & W.'s Con. Rep., § 1001.

In the case of the Western Union Telegraph Co. v. Weiting, W. & W.'s Con. Rep. § 801, decided by this court, Presiding Judge White, in delivering the opinion, discusses elaborately the question as to the correct measure of damages in actions against telegraph companies, such as the case now before us, and after reviewing the leading case of Hadley v. Baxendale, 9 Excheq. R. 341, and other authorities, adopts as the true rule the one laid down by Scott & Jarnagan in their work on the Law of Telegraphs, §§ 406, 407, 408, and notes, and supported by Mr. Redfield in his work on railroads. 2 Red. on Railroads, 3 ed., pp. 249, 250.

The rule is, substantially, that if the telegraph company fail to perform its contract by transmitting and delivering, correctly and promptly, a dispatch entrusted to it, and so disappoints, misleads, or deceives the party addressed, that damages are suffered, such damages will be measured by the extent of loss and injury naturally resulting from the error, or failure to deliver the dispatch. The company must make good the loss resulting directly from any default on its part. This rule is said to include gains prevented, as well as the losses sustained, provided such gains are certain, and such as might naturally be expected to follow the breach. But uncertain and contingent profits, not being the immediate and necessary result of the breach of the contract, are not such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract, and are to be excluded in estimating the damages.

Now, let us apply this rule to the damages claimed and awarded in this case, and ascertain if they come within the spirit and fair interpretation of the same. It is to be noted that the telegram sent by Harris to appellee is of an indefinite character, and upon its face does not indicate that it was about a matter of any great importance. It does not contain any proposition which, if accepted by appellee, would amount to a contract binding upon Harris. If appellee had answered the telegram that he wanted a place, and would go to Milano on the first train, and he had gone on the first train, Harris would not have been under any legal obligation to give him a place. Suppose appellee had received the telegram and had gone to Milano on the first train, and Harris had declined to give him the place, or had declined to employ him at $75 per month, for one month, or for any definite time, could appellee have maintained an action against Harris, to compel him to enter into such contract, or to recover damages for his refusal to do so? Clearly not. Harris had not proposed in the telegram to give appellee any particular place, for any definite time, at any specified price. There was nothing certain about the transaction; the whole matter was *in fieri* and contingent, depending upon whether or not, upon the meeting of the parties, they could, and did agree upon the terms of a contract. That they did not meet in time to make the contract was doubtless owing to the failure of appellant to deliver the telegram sent by Harris, promptly; that the contract would have been entered into had the parties met in time, and that by said contract appellee would have secured employment for the period of one month or more, at $75 per month, is altogether problematic and uncertain. How, then, can it be contended that he is entitled to recover of appellant an alleged loss of gain, which gain might never have been realized, even if the telegram had been promptly delivered to him. In our judgment such speculative damages are entirely too uncertain, conjectural, contingent and remote, to be considered.

A very similar case, in principal, to this one, was the case of Kinghorne v. The Montreal Telegraph Company, decided by the Court of Queen's Bench, Upper Canada, and reported in Allen's Telegraph Cases, p. 98. In that case the telegram sent was: "Will give you eighty cents for rye." The answer sent was, "Do accept your offer; ship to-morrow fifteen or twenty hundred." The action was for negligence in not transmitting the latter message. It was held that no damage for the loss of the sale of the rye could be recovered, because even if the telegram had been duly transmitted and delivered, there would have been no complete contract binding the purchaser to take any particular quantity of rye, and that parol evidence, to show that the purchaser would have taken a certain quantity, was immaterial. The doctrine of this case we believe to be sound, and well supported by both reason and authority. See also Baldwin v. U. S. Co., Allen's Telegraph Cases, p. 613; also reported in 54 Barb. (N. Y.) 505, and Abbott's Prac. Rep. (N. S.) 405.

We think the principle decided in that case is the same which is involved in this case, and we therefore hold that the damages sought to be recovered in this action are not such as can be allowed.

We are of the opinion that the only damages which appellee is entitled to recover in this action are the reasonable value of time lost by him in going to and returning from Milano, and the reasonable expenses of that trip. This, we think, would be the proper measure of damages for this case.

We think both the fourth and fifth assignment of error well taken, and because the trial court erred in holding the contrary, the judgment is reversed and the cause remanded.

NOTE.—It would be useless to attempt, in a short note, to review the question of proximate and remote damages, and we will have to content ourselves with a cursory examination of the authorities upon the question, as applied to telegraph cases. In Griffin v. Colver, 16 N. Y. 489, SELDEN, J., says: "The party injured (by any wrong) is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions; the damages must be such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract—that is, they must be such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed." Where a telegram offered and accepted to be transmitted, expresses the object of the sender, and by actionable negligence of the company in not delivering it, the company is liable for such injury as is the direct, natural, and necessary consequence of defeating the object which would have been accomplished by the seasonable delivery of the message. 3 Sutherland on Damages, 299. Thus where a broker was ordered by his principal to sell, and by reason of the negligence of the telegraph men, the message remained undelivered until the stock declined in price, the company was liable for the decline. Strasberger v. W. U. Tel. Co., N. Y. Sup. Ct., 1867; Allen's Tel. Cas. 661; Manville v. Same, 37 Iowa, 414. See Turner v. Hawkeye Tel. Co., 41 Id. 458. The same rule applies *mutadis mutandis* to a telegram ordering a purchase, and where the price advanced. True v. International Tel. Co., 60 Mo. 9; U. S. Tel. Co. v. Wenger, 55 Pa. St. 262. And a case somewhat resembling the principal case is Sweatland v. Illinois, etc. Tel. Co., 27 Iowa, 433; the difference being that in the principal case the message was not delivered at all, and in that case it was delivered with a change in its wording, and a bargain was lost in consequence thereof, the company was held responsible for all the consequences of their negligence. In Squire v. W. U. Tel. Co., 98 Mass. 232, BIGELOW, C. J., said: "The defendant undertook to transmit a message, which on its face purported to be an acceptance of an offer for the sale of merchandise. The agreement was to transmit and deliver it with reasonable diligence and dispatch, having reference to the ordinary mode of performing similar services by persons engaged in the same business. The natural consequence of a failure to fulfill the contract was that the party to whom the message was addressed, not receiving a reply to his offer to sell the merchandise in due season, would dispose of it to another person; that the plaintiff might be unable to procure an article of like kind and quality at the same price, and in order to obtain it would be obliged to pay a higher price for it in the market than he would have paid if the prior contract for its purchase had been completed by the seasonable delivery of the message by the defendant." The difference between this case and the principal case lay in the fact that the offer in the former was absolute, while in the latter it was merely contingent. In Leonoard v. New York, etc. Tel. Co., 41 N. Y. 544, where the message ordered "sacks" of salt, and the delivered message reading "casks," which were sent, the damage was the loss upon sale in the city whither the salt was sent, not the price of the salt. Substantially the same rule was applied in Washington, etc. Tel. Co. v. Hobson, 15 Gratt. 122, where a factor was ordered to buy 500 bales of cotton, and he bought nearly 2,500 which the delivered message ordered and the loss arising from the subsequent sale of th excess was held the measure of damages. See W U. Tel. Co. v. Graham, 1 Col. 230. Where in consequence of a failure to deliver a message ordering the sender's agent to make an attachment, the claim was lost, the sender was allowed as damages the whole claim. Parks v. Alta Cal. Tel. Co., 13 Cal. 422. A very nice illustration of the general doctrine may be seen in Sprague v. W. U. Tel. Co., 6 Daly, 200. The plaintiff sent a message to his attorney saying: "Hold my case until Tuesday or Thursday. Please reply." Receiving no answer, he concluded that no postponement was to be had, and he went with his counsel quite a distance to the place of trial. The message had not been delivered, and the case had been adjourned until a future day, in consequence of which the journey of himself and counsel was useless. Held that the expenses of both, and the counsel fee, was the measure of damages. In W. U. Tel. Co. v. Fenton, 52 Ind. 1, the plaintiff actually lost a situation by the neglect, and the company was held liable in substantial damages. Of course, the court in the principal case makes a distinction between it and that case, on the ground that there was nothing certain about the plaintiff getting employment.

It is, of course, always necessary that the loss be the natural consequence of the negligence. Where a message was sent for $500, and it was delivered $5000, which was sent and embezzled by the sendee, it was held that the embezzlement was not the proximate cause of the loss, could not have been reasonably expected, and, therefore, the company was not liable. Lowery v. W. U. Tel. Co. 60, N. Y. 198. See McCal v. Same, 12 J. & S. 487; Baldwin v. U. S. Tel. Co., 45 N. Y. 744; Rigby v. Hewitt, 5 Exch. 240; First Nat. Bank v. W. U. Tel. Co., 30 Ohio St. 555. So where a message read, "Get $10,000 of Mail Co.," and it was delayed, in consequence of which the plaintiffs were injured to the extent of about $1000, the company was held not liable for the damages because there was nothing in the telegram, which notified them of the consequences of delay. Landsberger v. Magnetic Tel. Co., 32 Barb. 530; *Cf.* True v. International Tel. Co., 60 Me. 9. Wherever the nature of the business for which the telegraph is employed is disclosed in a general way by the message, the company receives notice and if it desires further particulars, it must inquire for them. Candee v. W. U. Tel. Co., 34 Wis. 471. But it must be plain enough to inform the agent of the nature of the business. Thus a telegram, "sell fifty gold," is not plain enough to one who is not familiar with brokers' language. U. S. Tel. Co. 29 Md. 232; Kingthome v. Montreal Tel. Co., 18 N. C. Q. B. 60.—[ED. CENT. L. J.

STATUTORY CONSTRUCTION—INTERPRETATION OF WORD "VACATION"—CONFESSION OF JUDGMENT.

CONKLING v. RIDGELY.

Supreme Court of Illinois, March 26, 1884.

The word "vacation" as employed in the statutes authorizing confessions of judgments during "vacation of the courts," means that period which begins at the final adjournment of the court and ends at the beginning of the next term. Where a court adjourns for a month to a date in the same term, the interval is not "vacation."

Error to Appellate Court, Third District.

CRAIG, J., delivered the opinion of the court:

Section 66, chapter 110, of the Revised Statutes of 1874, provides that any person for a debt *bona fide* due may confess judgment by himself or attorney duly authorized either in term time or vacation without process. Judgments entered in vacation shall have like force and effect, and from the date thereof become liens in like manner and extent as judgments entered in term. Under what was supposed to be the authority conferred by this statute on the 12th day of January, 1883, the judgment in question was confessed before the clerk of the Circuit Court of Sangamon County and entered up in due form. It appears from the record that the fall term of the Circuit Court of Sangamon County commenced on the 2d day of October, 1882, and continued in session from day to day until December 27, when an order was entered adjourning the court until January 29th, 1883, when the court convened, and continued with the business of the term from day to day until Feb. 3d, 1883, when court adjourned *sine die*, or until court in course. If the judgment in question was confessed in term time it is manifestly void as the statute only authorizes a judgment by confession before the clerk of the court in vacation. But it is contended that the period of adjournment from December 27 to January 29, within the meaning of the statute is to be regarded as vacation, and hence the judgment is valid. The important inquiry thus presented by the record is what is the proper construction to be placed upon the words of the statute "in term time" and the words "in vacation." This statute being in derogation of the common law, in passing upon it the well-known rule that it should not be enlarged by construction must be kept in view. Words and phrases in a statute the meaning of which have been ascertained, are, when used in a subsequent statute to be understood in the same sense. Potter's Dwarris, 274. If, therefore, the words in term time and vacation at the time they were incorporated into the statute had a well known legal meaning it will be presumed that the legislature intended that they should be used in that sense. In Jacobson Dictionary, Vol. 6, 323, the author defines vacation as follows: "Is all the time between the end of one term and the beginning of another; and it begins the last day of every term as soon as the Court rises." Bonner, Vol. 2, 619, defines the word vacation as follows: "That period of time between the end of one term and beginning of another." In speaking of the word term the same author says; "The whole term is considered as but one day so that the judges may at any time during the term revise their judgments." These definitions of the words used are in harmony with those given by other law writers; indeed no writer that we have examined gives any other or different meaning of the terms used and we think it may be safely said that the words, at the time the statute was adopted had a well known legal meaning. But aside from this view of the question it seems to be well settled by decisions of courts that vacation when used in reference to courts is that time between the end or final adjournment of a term and the beginning of another. In Mechanics Bank of Alexander v. Withers 6 Wheaton 106, where the regular term began on the third Monday in April and continued until the 16th of May when it adjourned to the fourth Monday of June, it was held that the adjournment from the 16th of May to the fourth Monday in June was but a continuation of the April term. The same doctrine was announced in Commonwealth v. Sessions of Norfolk 5 Mass. 436 where it is said; "It is well understood by the people generally that a court holden by adjournment is not a new term but a continuance of the former term of court, and it is not infrequent for courts of Sessions to adjourn for the accommodation of persons having business in it." In Leil v. The Commonwealth, 9 Wall. 200 it was held that a day to which a court was adjourned is a part of the same term at which the adjournment was made. In Sanger v. Bryson, 10 Kansas 200 it was held that an adjourned term of court is in no proper sense an independent distinct term, but merely a prolongation—a continuance of that already begun. In Smith v. Smith, 17 Ind. 75 an adjourned term was held to be a part of the regular term. Under sec. 35 of Chap. 37 R. L. 1874 the Circuit Judge had authority to adjourn from day to day or to any day not beyond the first day of the next term of court, and the adjournment shown by the record was authorized by this statute. But we are satisfied that the adjournment from December 27 to January 29th, did not close the term, nor was the interim a vacation within the meaning of the statute. The interim could not be vacation, as the fall term of court had not ended, no final adjournment of the term had taken place, and hence vacation had not commenced. If there was a vacation here, and the clerk authorized to act because the court had adjourned for a period of thirty-two days for the same reason and upon the same principle he might act if the adjournment was but for ten days, or one day, or even one hour. We do not think the statute will bear such a construction. Suppose the court had adjourned for two hours instead of thirty-two days, and appellee had appeared before

the clerk and confessed the judgment, would any reasonable person conclude that the judgment was confessed in vacation? We apprehend not, and yet in principle there is no difference between a short adjournment and a long one, unless the adjournment exceeds the time provided by the statute. It is a mistake to suppose that on the 12th day of January, when the judgment was entered, the court had no power to act. The court has the power to review orders made during the term at any time before final judgment, and had the court seen proper on the 12th day of January, the order of adjournment might have been vacated, and upon a proper showing the business of the court resumed. At all events, we are satisfied that vacation intended by and within the meaning of the statute, can not begin until a final adjournment of court has taken place, and as the court had not adjourned for the term when the judgment was confessed before the clerk, the judgment was unauthorized and void. The judgment of the appellate court will be reversed and the cause remanded.

WEEKLY DIGEST OF RECENT CASES.

1. ADMIRALTY—MARITIME CONTRACT—WHAT IS.
A contract to furnish machinery to a steamer, which exists merely as an inchoate hull upon the ways, is not a maritime one. *Waddell v. The Daisy*, S. C. Wyoming Ter., 2 W. C. Rep. 557.

2. ASSUMPSIT—MONEY HAD AND RECEIVED.
An action for money had and received lies to recover back money paid by a debtor to his creditor to be applied in satisfaction of a particular obligation, when the same is not so applied, and the obligation is otherwise discharged. It is not necessary in such action to allege a promise to repay. *Stewart v. Phy*, S. C. Oregon, Feb. 14, 1884; 2 W. C. Rep. 536.

3. BOND—FALSE REPRESENTATIONS OF CO-OBLIGOR.
One who signs a note or bond can not avoid his liability by showing that he was induced to sign the same by the fraud of his co-obligor, in which the obligee did not participate. *Vass v. Riddick*, S. C. N. C., 17 Rep. 502.

4. CONTRACT—CONSTRUCTION OF—DIVISIBLE CONTRACT.
Plaintiff and defendant made the following contract: "I, H. B. B., agree to furnish W. B. 200 tons anthracite pig iron. * * * to be delivered in quantities of about 18 tons per month. I, W. B., agree to take the iron * * *." *Held*, that the contract is divisible, and that the failure of one party for one or more months to comply with its conditions, authorizes the other to annul it. *Bollman v. Burt*, Md. Ct. App., 12 Md. L. Rec. 51.

5. CORPORATIONS—STOCKHOLDERS—ASSIGNMENT—UNPAID SUBSCRIPTIONS TO STOCK.
Where a corporation has made an assignment for the benefit of its creditors, and the assignees have notified a stockholder to pay the unpaid subscription due on his stock, the action of the assignees is equivalent to a formal assessment by the officers of the bank, and the assignees may recover the amount of such unpaid subscription in an action of assumpsit brought by the corporation to their use. *Yeager v. Scranton, etc. Co.*, S. C. Pa., March 10, 1884; 14 W. N. C. 296.

6. CRIMINAL LAW—ONCE IN JEOPARDY—MURDER O TWO PERSONS AT SAME TIME AND BY SAME ACT.
The murder of two persons by the same act, constitutes two offenses, for each of which a separate prosecution will lie, and a conviction or acquitta in one case does not bar a prosecution in the other. And where two persons are directly concerned in the murder of two others, although the killing takes place at the same point of time, it does not follow necessarily that the murder of the two was accomplished by the same act. *People v. Majors*, S. C. Cal. April 1, 1884; 2 W. C. Rep. 580.

7. CRIMINAL PROCEDURE—INDICTMENT—RECEIVING STOLEN PROPERTY.
An indictment for receiving stolen property, knowing it to have been stolen, need not allege the place of the larceny.—*Com. v. Sullivan*, S. J. C. Mass. 17 Rep. 497.

8. EVIDENCE—CONTRADICTION OF WITNESS.
Where a witness for the defence denies that the accused ever told him that he intended to kill the deceased he cannot be contradicted by evidence that he told others that the accused did so tell him.—*People v. Bush*, S. C. Cal. March 29, 1884; 2 W. C. Rep. 575.

9. EVIDENCE—FACTS OR OPINION—TESTIMONY AS TO PAIN.
Where a plaintiff sues for personal injury and is a witness in his own behalf, and his pain, suffering, or internal condition is pertinent to the issue and perceptible to his senses, a question put to such party, eliciting a description of such pain, suffering or condition, and not necessarily requiring scientific skill and knowledge, is a question calling for facts and not mere opinion.—*Wright v. City*, S. C. Wis. March 18, 1884; 6 Wis. L. N. Apr. 15 1884.

10. EVIDENCE—PRINTED STATUTES OF ANOTHER STATE.
A printed volume purporting to be the statute law of another state, and stating on its title-page that it was "published by authority." but not indicating what authority, is not of itself competent to prove a statute of such state.—*Johnson v. State*, S. C. Ala. 17 Rep. 488.

11. EXEMPTIONS—WAIVER.
A defendant does not waive the right of claiming property as exempt from attachment by first tra-

versing the attachment upon other grounds.—*Bassett v. Guman*, S. C. Col. March 14 1884; 2 W. C. Rep. 534.

12. FALSE IMPRISONMENT—ABUSE OF PROCESS—IMPROPER ARREST.

Where the plaintiff, a locomotive engineer, while engaged in his duties about his engine, and when the engine was in a dangerous condition, from having steam up, was arrested, at night.—and when he was about to take a train out,—by an officer, for contempt on supplemental proceedings, in which he was a debtor, when the officer had an opportunity to make the arrest during the day, and was placed in a cold and filthy cell with criminals in a jail, *held*, abuse of process.—*Smith v. Weeks*, S. C. Wis. March 18, 1884; 18 N. W. Rep. 778.

13. JURY—COMPETENCY—CAUSE FOR CHALLENGE.

That a juror has served in the trial of one jointly indicted with the defendant, is not ground for challenge, if he states upon his *voir dire* that he has no opinion as to the guilt or innocence of the accused. *Mooney v. People*, S. C. Col. Feb. 29, 1884; 4 Col. L. Rep. 581.

14. NOTICE—CONSTRUCTIVE—PROBATE OF WILL AS NOTICE OF EQUITABLE RIGHTS.

Where a will of a husband provided for his widow, and devised among other things certain lands of his wife, and she elected to take under the will, she thereby lost her title to the land, and the devisee thereof became the owner in equity; but as against her mortgagee of the land after such election, such devisee has no claim, the probate of the will and her election to take under it not being notice of such equitable rights. *Hibbs v. Ins. Co.*, S. C. Ohio, March 4, 1884; 5 Ohio L. J. 369.

15. PARTNERSHIP—LETTERS PATENT—ASSETS.

Where a partnership owns letters patent, such letters patent are a part of the assets of the firm; and upon the death of one partner must be treated like its other assets. The surviving partner is not justified in treating the letters patent as property in which he owns an undivided half as tenant in common; but he must account to the firm for all profits made by him individually from the use of the patent since the dissolution of the firm. *Freeman v. Freeman*, S. J. C. Mass. Jan. 29, 1884; 17 Rep. 499.

6. RAILROAD—NEGLIGENCE—ACT OF MAIL AGENT.

A railroad corporation is responsible to a passenger who, while waiting at a station and using due care, is struck by a mail-bag thrown from its mail-car by a United States mail agent. *Snow v. Fitchburg R. Co.*, S. J. C. Mass. Feb. 2, 1884; 17 Rep. 488.

17. SET OFF—CONVERSION.

A real estate broker, against whom an action for trover is brought for his unlawful detention of papers, cannot set off the amount of expense incurred by him in attempting to effect a sale of premises, to enable him to sell which the papers were deposited with him. *Arthur v. Sylvester*, S. C. Pa. March 3, 1884; 17 Rep. 475.

18. SLANDER—ELEMENTS OF DAMAGES.

In an action for slander, the plaintiff may prove his own mental suffering in consequence of the slanderous utterances, in aggravation of damages. *Chesley v. Tompson*, S. J. C. Mass., March, 1884.

19. STATUTE OF FRAUDS—LAND—PARTNERSHIP NOT WITHIN.

A contract to enter into a partnership, for the purpose of speculating in lands, is not within the the statute of frauds, and need not be in writing. *Richards v. Gainnel*, S. C. Iowa, March 19, 1884; 18 N. W. Rep. 668.

20. STATUTE OF FRAUDS—ORIGINAL AND COLLATERAL PROMISES.

Where the employe of a contractor neglects to assert a lien upon logs upon which he has worked, on account of a promise by owner of the logs that he will pay him, the consideration for such promise inures directly to the owner, and the promise is not within the statute of frauds as being one to "answer for the debt, default, or miscarriage of of another." *Kelly v. Schupp*, S. C. Wis. March 18, 1884; 18 N. W. Rep. 725.

21. STATUTES—EXTRA TERRITORIAL FORCE—STOCK—KILLING LAWS.

Where the statutory law of one State is the same upon the double liability of a railroad for killing stock as it is in the State where the stock was killed an action may be maintained in the former on the statute of the latter. *Boyce v. Wabash Ry. Co.*, S. C. Iowa, March 9, 1884; 18 N. W. Rep. 673.

22. STATUTES OF CONFEDERATE CONGRESS—CONFISCATION NO DEFENSE.

It is no defense to a suit brought against an executor to compel the payment of a legacy that the amount of the legacy was confiscated by the confederate government, and the executor compelled to pay it into the public coffer, under judgment of the State court, acting in pursuance of a law of the confederate Congress. *Steven v. Griffith*, U. S. S. C. March 17, 1884; 4 S. C. Rep. 283.

23. STATUTORY CONSTRUCTION—EXCESS OF AUTHORITY—LEGALITY OF ORDINANCE.

Power given to a city "to pass ordiances to preserve the health of the city, to prevent and remove nuisances" etc., does not authorize the city to suppress by ordinance lime kilns on the outskirts of the city, where they are entirely free from obnoxiousness. Such power must be exercised reasonably, not arbitrarily.—*State v. Mott*, Md. Ct. App. 12 Md. L. Rec. 52.

24. SURETYSHIP—DISCHARGE—BANK CASHIER DEFAULTER WHEN MADE.

A surety upon the bond of a cashier of a bank is not discharged by the fact that the cashier was, at the time the bond was given, a defaulter. Nor will the neglect of the bank to ascertain the fact discharge him.—*Bowne v. Mt. Holly Holly Nat. Bank*, N. J. Ct. App. 17 Rep. 472.

25. SURETYSHIP—DISCHARGE—CO-SURETY—CONTRIBUTION.

The rule that a surety is discharged by the creditor dealing with the principal, or with a co-surety, does not apply to the case of co-sureties who have contracted severally. *Ward v. Nat. Bank, etc.* Eng. Privy Council, 49 L. T. N. S. 315; 17 Rep. 479.

26. TRADE MARK—TRANSFER BY GENERAL CONVEYANCE.

A trade mark will pass under a general conveyance of all the assets and effects of a firm, though not specifically designated. *Morgan v. Rogers*, U. S. C. C. D. R. J. Feb. 12, 1884; 17 Fed. Rep. 596.

27. UNITED STATES MARSHAL—UNLAWFUL SEIZURE—ATTACHMENT—BOND.

The taking by a marshal of the United States, upon a writ of attachment on mesne process against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable. *Lammon v. Feusier*, U. S. S. C. March 17, 1884; 4 S. C. Rep. 286.

28. USURY—PARTY ASSUMING DEBT CAN NOT TAKE ADVANTAGE OF.

A party who purchases land subject to a trust deed thereon securing the payment of a note of the grantor, which he, the purchaser, agrees to pay as a part of the purchase money, can not interpose the defense of usury on a bill to foreclose the trust deed of his grantor. *Stiger v. Bent*, S. C. Ill. March, 1884; Reporter's Head Notes.

29. WILL—CONSTRUCTION—DEVISE—PER STRIPES.

Under a devise of the *residuum* to be equally divided between the heirs of the said B (a daughter of the testator) who might be living at the time of said division and C (the son and only heir of another deceased daughter) each to share and share alike, C took *per stirpes i. e.* one half. *Osborn's Appeal*, S. C. Pa. Jan. 7 1884; 14 W. N. C. 299.

QUERIES AND ANSWERS.

[**** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

35. Will an act of sodomy or beastiality, *i. e.* having carnal knowledge of a beast, entitle a wife to a divorce? Please give the American authorities, we have the English. J. W. T.

Winchester, Ind.

36. If a husband, two years after desertion of his wife on account of her adultery, but before the filing or his libel for divorce, himself commits adultery, is this a bar to his petition?

A TEN YEARS' SUBCRIBER.

Texas.

37. A borrowed a sum of money from B for the purpose of buying certain lands; executed his note, and promised to give B a mortgage upon the land as soon as he (A) should obtain his deed, but A died before executing the mortgage. Will equity create a lien upon the land in favor of B? A. DE R.

Benton, Mo.

38. Under Section 5722 of Vol. 2, Revised Statutes of Mo., "All judgments by confession, conveyances, bonds, bills, notes and securities, when the consideration is money or property won at any game or gambling device, shall be void, etc." Is a bank check given in exchange for "chips," which are afterwards lost in a game of "faro" void? Cite cases. D.

Kansas City, Mo.

39. When the obligation of a debt is transferred from one to a third person with the consent of the creditor, *i. e.* when A, B and C all agree that B shall become liable to C for a debt due from A to B, and A is discharged. 1. When does the statute of limitations begin to run as against B? From the time of the novation or the time the debt was originally contracted? 2. What ought the action against B be founded on? On the promise of B, or on the original debt, assumed by B? Please cite authorities.

AN OLD SUBSCRIBER.

Chicago, Ill.

40. A brought suit for damages against a municipal corporation for injuries received by falling into a defect in the sidewalk of the street, and on the trial, offered to prove that the defendant corporation repaired the defect after the injury happened, for the purpose of showing that the defendant recognized it as one which it was bound to repair. Was this evidence admissible either for the above purpose or for any other purpose? A SUBSCRIBER.

41. A applies to broker for loan of money, and presents life insurance policy on his own life, made payable to his wife. Broker fills out assignment absolute on face to himself. A takes same and obtains signature of his wife representing that it is for the purpose of obtaining a paid up policy. Broker in good faith, without any knowledge of representations made to wife, loaned A $600 relying upon the assignment for security. Can wife defeat the broker from recovering on his security? Cite authorities. X.

42. B conveyed A a tract of land on which A paid down $1000 cash. C lent A the money to make this payment and A executed to C the following instrument "due C $1000 being money borrowed and paid on land bought of B" signed W. C. alleges it was agreed he should have a lien on the land and the paper was drawn to express this agreement and if it does not do so, it was a mistake of law in drawing the agreement as to what it should contain to confer a lien. 1. Has he a lien under the writing. 2. Can the writing be aided by parol proof of the facts alleged, and a lien enforced. H.

43. A has a judgment against B six months prior to the commencement of the suit and rendition of the judgment (and before the debt was contracted) B made a trust deed in consideration of love and affection with a clause and "the grantor to have possession to rent and enjoy above property on his demand and judgment." The deed was deposited in C's hands as trustee, who was and is B's attorney. The deed was not recorded until after rendition of judgment and levy made, the grantor still remaining in possession of the property. 1st. Does the depositing of the trust deed with C, the trustee, who was and is B's attorney Constitute a valid delivery? 2nd. Will the trust deed recorded after levy made, defeat the lien? 3rd. Will the above reservation defeat the trust deed as to A's lien? Please cite authorities.

Iowa City, Iowa. A. E. M.

44. A living in Ohio, being indebted, and his creditors threatening him, for the purpose of evading his creditors, deeds without consideration all his real estate to his son B. The latter without consideration, deeds part of the land conveyed to him by A to C, B's sister and A's daughter, which deed is recorded. C and her husband, D, enter upon and occupy the land. D, the husband, makes some improvements and then be-

comes dissatisfied about his wife's title to the land, she having known of A's fraudulent intent, and the fact that A's deed to B was made without consideration. C then goes to A and induces him to make a second deed to her husband, D. for the same land already conveyed to herself by B, she making no reconveyance to A or to anyone. C then dies. D continues in the possession of the land for several years, and then for a valuable consideration sells the land to E, an innocent purchaser without actual notice of the deeds from A to B and B to C. D then dies, and C's heirs bring suit against E to dispossess him claiming under C's deed. Can they maintain their action? Are they not estopped as against E an innocent purchaser by the acts of their ancestor C, a married woman, in inducing the making by A to D of the deed which enabled D to represent himself as the owner of the land to E and to thus defraud E? X.

QUERIES ANSWERED.

Query 31. [18 Cent. L. J. 260.] A testator gives "to the Board of Foreign Missions, and to the Board of Domestic Missions $10,000." Is this a gift of $10,000 to each? Please cite cases. J. H. S.
Trenton, N. J.

Answer. It is a gift of $10,000 to each. Trigg v. King, 1 Randolph (Va.) 252. WM. S. ABERT.
Washington, D. C.

Query 34. [18 Cent. L. J. 298.] One Jones, party of the first part conveyed to "A. B. husband of C. D. and the heirs of A. B. and C. D. parties of the second part" real estate to have and to hold unto "the said parties of the second part and their heirs." At the time of the conveyance A. B. & C. D. had two children living. What estate, if any, did the two children acquire by said conveyance?
Denver, Colo. B.

Answer No. 1. The children take as purchasers jointly with the father. Powell on Devises, p. 500; 2 Redfield on Wills, 66-8; Cessna v. Cessna, 4 Bush. 516. J. P. HOBSON.
Elizabethtown, Ky.

Answer No. 2. The children were remaindermen after the tenancy for life of A B. A B was the only grantee *in esse* when the conveyance was executed. He could not become tenant in fee simple under the rule in Shelly's case, because the words of limitation referred to his children by his wife, C D. Those children, of course, could not be "heirs" until his death; *nemo est haeres viventis*. At his death their title would ripen into a fee simple. S. R. H.
Bucyrus, O.

CORRESPONDENCE.

We do not desire to be understood as sanctioning any of the political arguments or references of our correspondent in the following communication. If we could have eliminated them we would have gladly done so, as we have no room for political discussion. —[ED. CENT. L. J.

Editor Central Law Journal:

A communication in your issue of April 11th, ventures to question the legality of the appointment of Judge Brewer as circuit judge for the Eight Judicial Circuit. It so happening that Judge Brewer is a member of the Supreme Court of Kansas, the communication affects to regard it an insurmountable objection to his promotion, that the Constitution of Kansas provides that "no justice of the Supreme Court * * * * shall be eligible to any other office of trust or profit, either Federal or State, during the period for which said justice or judge shall have been elected." It is surprising that such an objection should emanate from any one pretending to a knowledge of the law. In the first place, the eligibility of any person to a Federal office, is clearly a Federal question. In Federal questions, the rules of decision of Federal courts and the Federal laws constitute the sole guidance. The decisions of State courts and State Constitutions have no effect whatsoever in such cases. Howmuchsoever the Supreme Court of the United States has striven to harmonize its rulings with those of the courts of the States whence causes may have come to it on appeal or error, it has steadfastly maintained its own independent judgment in Federal questions to the overthrow of State decisions, laws and Constitutions. See cases reported in 107 U. S. S. C. 20-34, 101 Id. 679, 100 Id. 47, 94 Id. 260-267. An appointment to a Federal office being so exclusively a matter of Federal cognizance, it would strike one as being an impertinent intrusion for a State to prescribe the qualifications to such office. The Kansas Constitution to that extent stretches States' rights into Federal domains. The cry of Federal usurpation, so often raised by the advocates of States' rights, may be directed by the Federalists against this Constitution. Again, a reference to the United States Constitution and the Federal laws thereunder would destroy the objection. Article VI, section 2 of the Constitution of the United States, provides that "This Constitution and the laws of the United States which shall be made in pursuance thereof; * * * * shall be the supreme law of the land; and the judges in every State shall be bound thereby; anything in the Constitution or laws of any State to the contrary notwithstanding." Article III, section 1, provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish. By article I, section 8, Congress alone has the power to "constitute tribunals inferior to the Supreme Court," thereby conferring upon that body the exclusive power of determining the machinery of such courts and the eligibility of its officers, subject, however, to section 3 of article XIV, of that instrument. Now, by section 604 and 607 of the United States Revised Statutes, Congress has legislated upon this question, and has added the only statutory qualification, requiring a residence within the circuit. In view of these plain provisions, of the oft-repeated construction of them, and of the constant and much approved practice of elevating State judges to the Federal bench, it is difficult to see wherein the Kansas proviso is tenable, and how your correspondent can sustain his position by his appeal to what he calls "judicial common decency." One would suppose that according to this standard of decency, the appointments of Justices Gray, Nelson, Strong, Field and Hunt to the United States Supreme Court were exceedingly indelicate and offensive. The common sense of the profession disagrees from that conclusion. Considering the weakness of the point raised against Judge Brewer and the goodness of the appointment, may I not inquire whether the opposition be not *in personam* rather than *de jure*? Does it not look like a personal exception, and, if so, would it not be better to state it before the Senate confirms the appointment?
OHIO.

Editor Central Law Journal:

"H. J. D." in the journal of March 21, says I was in error in stating that statutes abolishing joint tenancies did not abolish tenancies by entireties, and that courts so construed them. He cites Hoffman v. Stigers, 28 Iowa 302; Clark v. Clark, 56 N. H. 105; Cooper v. Cooper, 76 Ill. 57; Meeker v. Wright, 76 N. Y. 262, as cases deciding that such statutes do abolish tenancies by entireties.

He is in error, to such an extent that it is questionable whether he ever closely examined these cases. Meeker v. Wright, contains only a dictum that tenancies by entireties had been abolished in New York; but the abolition was brought about by an enabling act abolishing the disabilities of a married woman and empowering her to hold real estate, and other property, separate and apart from her husband, and in effect destroying the maxim of the common law that husband and wife, in law, constitute only one person the act having made them two persons in law, it was held as a necessary result, that another act abolishing joint tenancies, applied to a conveyance to husband and wife. But this result was reached only by reason of the enabling act; and if that act had not been passed, no such result would have been reached. The decision upon this point in Meeker v. Wright is only a dictum on the opinion of a judge and this dictum is expressly denied, and the old common law distinction adhered to in Bertles v. Nunan, 92 N. Y. 152; S. C. 44. Am. Rep. 361. The same is true of Cooper v. Cooper, and Clark v. Clark. The case most nearly supporting "H. J. D's" statement is Hoffman v. Stigers; but a careful examination of that case will convince any one, open to conviction, that it proceeds upon exactly the same reasoning employed in the case cited.

I may here remark that the only cases in any wise supporting his statement are Sergeant v. Steinberger, 2 Ohio 305; Wilson v. Fleming, 13 Ohio 68; Penn v. Cox, 16 Ohio 309; Whittlesey v. Fuller, 11 Conn. 340, simply holds that no such an estate ever existed in Connecticut, because of the common understanding to that effect had been so long acquiesced in that state that the court was unwilling to disturb it.

Crawfordsville, Ind. W. W. THORNTON.

Editor Central Law Journal:

The New York Court of Appeals recently rendered two decisions relating to "Tenancy by the Entirety" not mentioned in the article by Mr. Thornton, published in your journal of the 7th inst.

The Revised Statutes of this State provide that "every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy." It is, however, held, that notwithstanding the changes wrought here by the Married Women's Acts, the common law unity of husband and wife has not been so impaired as to render the statutory provision quoted applicable to a conveyance to husband and wife, and that tenancy by the entirety still exists in this State. See Bertels v. Nunan, 92 N. Y. 152, and Freel v. Buckley, 92 N. Y. 634, both decided in April, 1883.

This had been uniformly held by our Supreme Court down to 1879, and in Bertels v. Nunan, the Court of Appeals say they have no doubt that property to the value of millions is now held under conveyances made in reliance upon such decisions. But in 1879 much disquiet and uncertainty arose, consequent upon Meeker v. Wright, (76 N. Y. 262) a case in which one of the two grounds given in the opinion for the conclusion reached was, that tenancy by the entirety no longer exists. True, this was not adjudicated upon, as four of the seven judges concurred on the other ground. Still, the concurrence of the remaining judges was unqualified, and the case led to decisions of inferior tribunals holding that the ancient tenure had been abolished. As before stated, in Bertels v. Nunan and Freel v. Buckley, an opposite conclusion has been reached; and similar decisions rendered in other States having Married Women's Acts are adduced, including Chandler v. Cheney, 37 Ind. 391, cited in Dodge v. Kinzy. FERDINAND SHACK.

New York City.

RECENT LEGAL LITERATURE.

HAYNE'S NEW TRIAL AND APPEAL.—A treatise on New Trial and Appeal and other proceedings for review in Civil cases. By Robert Y. Hayne of the San Francisco Bar. In two volumes. San Francisco, 1884; Sumner Whitney & Co.

The purpose of the work before us, according to the author is to give an account of the modes in which the proceedings of courts of justice may be reviewed and the practice in relation thereto. Its scope has been limited generally to the practice of California; but a great many topics treated particularly in those portions of the work relating to the grounds upon which a new trial may be granted viz. irregularity of the court, jury or adverse party, misconduct of the jury, accident, surprise etc, are common to all states and the treatment of these topics is what gives whatever value it enjoys outside of California.

The aim of the author is to furnish the meat of every case, rather than to state the rule laid down in a case, and referring by way of citation to the case itself. He, with Mr. Wood, condemns the tendency to reduce the law upon a subject to rules. We disagree with them both. We believe that the law would be in much more practical shape for the practitioner, if every thing were reduced to rules, well illustrated by cases. This system of quoting case after case, between which there is hardly any preceptible difference except in the names of the parties; incorporating *dicta* after *dicta* of judges merely to fill up, and make, if you please, a two volume work is one we most strongly condemn. Authors should regard the interests of the practitioner more than they do. A practitioner is generally willing to refer to a case if the author will make it easy for him to obtain it. There are very few works which courts will take as authority; and authors should devote themselves to stating clearly what the law is, and giving only necessary explanation. The tendency of the times is to become prosy, we admit, but no apology for this practice, it seems to us, is acceptable. One American author at least, Mr. Lawson has dared to adopt this new system, that of reducing the law to a definite form, and furnishing rules upon which the courts have placed themselves and behind which they cannot go. But when we have but a host of authorities seemingly bearing no relation to a definite principle, the practitioner finds little consolation in his search. We know it is difficult to discuss progress to a conservative bar, but we think that the bar will soon see the merit of the new system.

Recurring to the work before us, we can say that it is well written, and is exhaustive of the subject. The treatment of the subject is logical. He does it complete justice in fifty seven chapters; and at the end of each volume furnishes a carefully prepared index to

the volume in which it appears. The author appears to have examined some 3500 cases and he furnishes the results of his research in a manner which does him credit. The latter part of his second volume is devoted to a consideration of extraordinary remedies. As we have said, the work will prove very useful in California; but its value will not be great outside of that State. The mechanical execution of the work is worthy of commendation.

TENTH STEWART. Reports of Cases Decided in the Court of Chancery, the Prerogative Court, and on Appeal in the Court of Errors and Appeals of the State of New Jersey. John H. Stewart, Reporter, Vol. X, Trenton, N. J., 1884; The W. S. Sharp Printing Co.

This volume of these reports contains opinions delivered at the May, June, October and November terms of the various courts. They number about two hundred and twenty-five, and thus each opinion averages less than three and one-half pages in length, including the valuable notes prepared by Mr. Stewart to twenty-seven of the cases. There are very few cases in which the judgment has not been unanimous, and the longest opinion, we believe, may be found in Summerbell v. Summerbell, which we have noted in the JOURNAL, and covers twenty-three pages. The reporter furnishes an appendix which contains an index to his notes to the cases in his ten volumes. Mr. Stewart is certainly the most enterprising and painstaking reporter in this country. We wish that every reporter had the inclination or opportunity to bestow so much attention upon their work. The profession appreciate it; and we hail the day when the reporters will so heartily appreciate the needs of the practitioner, as does Mr. Stewart. We observe a great many indorsements of Mr. Stewart's work at the beginning of the report. They could have been very well left out; the work speaks for itself. We hardly approve of this style of advertising; but it is one consolation that the reader will be obliged, if his eye catches them, to read opinions, no more complimentary to the reporter than his own. It is printed and bound in the best of fashion.

COMMENTARIES ON AMERICAN LAW. Commentaries on Law, Embracing Chapters on the Nature, the Source, and the History of Law, on International Law, Public and Private, and on Constitutional and Statutory Law. By Francis Wharton, LL.D., Member of the Institute of International Law, Author of Treatises on Conflict of Laws, on Criminal Law, on Evidence and on Contracts. Philadelphia, 1884; Kay & Brother.

This latest work of the great modern commentator, Dr. Wharton, is an attempt to give an exposition of what may be called public law for the use of students of all classes. It is divided into seven chapters. Chapter I is devoted to a discussion of the nature and classification of the law, in which he describes the growth of American law with his inimitable clearness and force. Chapter II is devoted to the examination of the various theories as to the source of law. In Chapter III the history of both American and English law forms the basis for discussion. In this chapter, all the leading treatises upon law are considered, and their merits, as well as those of the authors themselves, are dwelt upon. The reforms in the law are also noticed. Chapter IV furnishes us with a concise treatise on Public International Law, of which the learned author has made a thorough study. Chapter V is a treatise in the same concise style upon Private International Law. The author has already written a treatise on Conflict of Laws, and this chapter is evidently a condensation of that work. Chapter VI is also a treatise upon Constitutional Law, which is a new subject for Dr. Wharton's pen, and in this chapter is furnished an able discussion of that subject. Lastly, Chapter VII is devoted to the consideration of Statutes. The learned commentator has added to the stock of literature something of which he may be proud. It is not only valuable to the student, but to to the practitioner. There he will find the subjects of Conflict of Laws, Constitutional Law and Statutes ably treated, which of themselves give the book great value. Every practitioner is in a sense a student, and it would not hurt the bar generally if it were more familiar with the history and nature of law. It may seem that the discussion of these abstract questions is without value to the practitioner; but it is not the fact. The author has earned an additional token of gratitude for his last contribution. We have heard it said that Dr. Wharton never enters a new field, but follows and imitates other writers. Be it so; but he has never followed except to improve; he has never touched anything with his magic hand, but what showed glittering improvement of the work of others. The work of the author whocan improve upon the work coming from an able pen, is entitled to lasting credit, and it is to his credit also, that he has had the boldness to attempt it.

NOTES.

——The highest paid judicial official in Greece is £256. Either his vacation must occupy the greater part of the year, or clients are scarce there. This may be encouraging to those going West to "grow up" with the towns.

——At a legal investigation of a liquor seizure the judge asked an unwilling witness "What was in the barrel that you had?" The reply, "Well, your honour, it was marked 'whiskey' on one end of the barrel and 'Pat Duffy' on the other, so I can not say whether it was whiskey or Pat Duffy was in the barrel, being as I am on my oath."

——We assure our trinitarian neighbor that the "Hub" has not been removed to St. Louis—not the whole of it. We judged from the sound of trumpets which we heard when the *American* removed from the "Hub" that nothing was left there.

——In an article on "the 'Hub' again," the *American Law Review* for March, April, 1884, after joking about the "Hub" and our connection therewith says, "The new editor of the CENTRAL is putting new life into the old concern," (this is the respectful way it alludes to us,) "and whipping it forward to the head of the procession. We predict that he will become a popular editor. We hanker after each number of his paper before its issue, to see what he is going to say next. We assume that human nature is pretty much the same the world over, at least throughout the West, and that this hankering exists on the part of other readers as well as ourselves." Can we not allay our neighbor's impatience in some measure by furnishing it our galley proofs? We are sorry that our neighbor is so troubled to know beforehand what we are going to say. Perhaps its anxiety is a personal matter, on account of the blast we gave it upon the question of "provincial conceit." We will do anything to accommodate our friendly cotemporary, in consideration for its kindly appreciation of our labors. If it ever lacks any matter, we can lend it some. If it desires to amuse itself, however, we think that the *American* should let *us* have a slight share of the fun.